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Supreme Court, U. S.
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71-1609

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
a public corporation,
Petitioner

vs.

KENNETH L. KARST, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California
Second Appellate District, Division Three

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Second Appellate District, Division Three

The Petitioner, The Regents of the University of California, a public corporation, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, State of California, Second Appellate District, Division Three, entered in this proceeding on January 26, 1972.

OPINION BELOW

The opinion of the Court of Appeal, State of California, Second Appellate District, Division Three, not officially reported, is set forth as Appendix A to this Petition. No opinion was rendered by the California Supreme Court which denied a hearing without issuing an opinion. The trial court, the Superior Court of the State of California for the County of Los Angeles, issued two summary judgments in favor of Respondents filed on October 21 and October 24, 1969, copies of which are set forth, respectively, as Appendix B and Appendix C to this Petition.

JURISDICTION

The opinion and judgment of the California Court of Appeal, Second Appellate District, was entered on January 26, 1972. Thereafter, petitioner filed a timely petition for a hearing of the case by the Supreme Court of California which was denied on March 22, 1972. This petition for certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the University of California can exclude from its faculty members of the Communist Party by reason of their want of academic integrity and opposition to the principles of academic freedom.

STATEMENT OF THE CASE

Respondents brought this action suing as taxpayers seeking to have declared unconstitutional the policy of The Regents of the University of California (hereinafter the "Regents") which excludes members of the Communist Party from the University's faculty. (C.T. 2, 6.) The Superior Court for the County of Los Angeles entered summary judgments in favor of respondents declaring to be unconstitutional the policy of the Regents excluding members of the Communist Party from the University's faculty. (C.T. 169, 178; Appendices B and C to this Petition.)

The decision of the California Court of Appeal issued on January 26, 1972 (set forth as Appendix A to this Petition) affirmed the summary judgments. The unsigned majority opinion of the California Court of Appeal contains no discussion of the important constitutional issue presented in this case other than the conclusionary statement that:

> "It is manifest that the judgments are sustained by the reasoning of *Keyishian v. Board of Regents, supra*, 385 U.S. 589, *Elfbrandt v. Russell, supra*, 384 U.S. 11, and *Vogel v. County of Los Angeles, supra*, 68 Cal. 2d 18. This court as an intermediate court of appellate review is bound by that reasoning. Consequently, a plenary discussion in this opinion of the arguments made on behalf of the Regents would serve no purpose." (Appendix A, p. vii.)

Justice Allport dissented from the decision of the California Court of Appeal stating:

> "A plenary examination of the communist dogma, its objectives and the conduct of the Communist Party member in connection therewith while on the teaching faculty of the University pose potentially valid constitutional grounds for the exclusion of such a person from such a position . . . . I am unable to subscribe to the view that the resolutions herein were, as a matter of law, violative of the California or United States Constitutions. The position which the majority feels compelled to take herein suggests the need for an immediate reevaluation of the subject . . . ." (p. 10.)

Although the case was fully briefed before the California Supreme Court, that Court disposed of the case without opinion by a simple order denying a hearing.

REASONS FOR GRANTING THE WRIT

1. THE JUDGMENT BELOW DECIDES AN IMPORTANT FEDERAL CONSTITUTIONAL LAW QUESTION, NOT HERETOFORE DETERMINED BY THIS COURT, AND IN A WAY NOT IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT

The California Court of Appeal erroneously concluded that it was constrained to hold unconstitutional the Regents' policy excluding members of the Communist Party from the University's faculty by reason of this Court's decisions in the cases of *Keyishian v. Board of Regents of New York* (1967) 385 U.S. 589, 17 L.Ed.2d 629 and *Elfbrandt v. Russell* (1966) 384 U.S. 11, 16 L.Ed.2d 321 and a decision of the California Supreme Court based upon those cases, *Vogel*

v. *County of Los Angeles* (1967) 68 Cal.2d 18, 434 P.2d 961. As discussed below, those cases involved an issue distinct from that presented in this case. Analogous decisions of this Court clearly indicate the constitutionality of the Regents' policy here in question which is fully justified by valid educational policy considerations.

On October 11, 1940, The Regents of the University of California adopted a resolution which remains in full force and effect that:

> "The Regents believe that the Communist Party . . . gives its first loyalty to a foreign political movement and, perhaps, to a foreign government; that by taking advantage of the idealism and inexperience of youth, and by exploiting the distress of underprivileged groups, it breeds suspicion and discord, and thus divides the democratic forces upon which the welfare of our country depends. They believe, therefore, that membership in the Communist Party is incompatible with membership in the faculty of a State University. Tolerance must not mean indifference to practices which contradict the spirit and the purposes of the way of life to which the University of California as an instrument of democracy is committed." (C.T. 172.)

This policy was reaffirmed by resolutions adopted by the Regents on June 24, 1949 (C.T. 173) and April 21, 1950 (C.T. 174). As is evident from a reading of these policy statements, they are based upon the consideration that "membership in the Communist Party is incompatible with objective teaching and with search for the truth." (C.T. 172.) As is sum-

marized in the ensuing portions of this Petition, this conclusion is fully supported by official determinations concerning the Communist Party, by the findings of leading educational associations and by the writings of distinguished scholars and educators who have studied the matter.

As noted above, the majority opinion of the California Court of Appeal contains no consideration whatsoever of the constitutional issue presented in this case other than the conclusionary statement that:

> "It is manifest that the judgments are sustained by the reasoning of *Keyishian v. Board of Regents, supra,* 385 U.S. 589, *Elfbrandt v. Russell, supra,* 384 U.S. 11, and *Vogel v. County of Los Angeles, supra,* 68 Cal.2d 18. This court as an intermediate court of appellate review is bound by that reasoning. Consequently, a plenary discussion in this opinion of the arguments made on behalf of the Regents would serve no purpose." (Appendix A, p. vii.)

Each of these cases, and others relied upon by respondents such as *Wieman v. Updegraff* (1952) 344 U.S. 183, 97 L.Ed. 216, and *United States v. Robel* (1967) 389 U.S. 258, 19 L.Ed.2d 508, involved only laws which denied public employment to persons who are members of the Communist Party or other subversive organizations *on the basis of the individual's presumed disloyalty or subversive activities.* None of these cases holds that a state university may not reasonably determine that persons who join and remain members of the Communist Party are disqualified from serving on its faculty *by reason of lack of academic in-*

tegrity or want of professional ethics. The distinction is a critical one. As stated by this Court in *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 247-248, 1 L.Ed.2d 1311, 1323:

> "'There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.'"

For that reason, this Court has held that there is not a "constitutionally adequate basis for exclusion" from public employment on the grounds of disloyalty of members of subversive organizations unless there is a showing of "a specific intent to further the unlawful aims of an organization." (*Keyishian v. Board of Regents of New York* (1967) 385 U.S. 589, 606, 17 L.Ed.2d 629, 642.)

Quite distinct considerations are presented as regards the Regents' policy excluding members of the Communist Party from the University's faculty. Any such disqualification contains no stain or stamp of disloyalty or subversion. Indeed, it is clear that the policy can have no such implication since, as the California Supreme Court held in *Tolman v. Underhill* (1952) 39 Cal.2d 708, 713, the loyalty of California state employees, including University of California personnel, is a matter which has been preempted by the Legislature.

The policy excluding members of the Communist Party from the University's faculty when applied in an individual case means no more and no less than

that the individual does not meet one of the academic qualifications for a faculty position. There can be no doubt that such a policy concerning qualifications for faculty is well within the "full powers of organization and government" with respect to the University vested in the Board of Regents by Article IX, Section 9 of the California Constitution. *Hamilton v. University of California* (1934) 293 U.S. 245, 255-257, 79 L.Ed. 343, 349; *Wall v. Board of Regents, U.C.* (1940) 38 Cal. App.2d 698, 102 P.2d 533.

The single most analogous authority to the issue presented in this case is *American Communications Asso. v. Douds* (1950) 339 U.S. 382, 94 L.Ed. 925. *Douds* held constitutional the then section 9(h) of the Labor-Management Relations Act requiring each officer of a union certified by the National Labor Relations Board to file an affidavit that he is not a member of the Communist Party. Holding that this law was justified by the public interest in preventing political strikes, this Court observed:

> "There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce. We think it is clear, in addition, that the remedy provided by §9(h) bears [a] reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about

strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy." (339 U.S. at 390-391, 94 L.Ed. at 939.)

Or, as stated in the concurring opinion of Justice Frankfurter:

"It must suffice for me to say that the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue. To deny that, as a matter of experience, that is a judgment which Congress may enforce even though it involves the indicated restrictions upon freedom would be to make naivete a requirement in judges." (339 U.S. at 418, 94 L.Ed. at 954.)

Just as Congress may determine that members of the Communist Party should be excluded from officer positions in NLRB certified labor unions because their obligations to the Communist Party involve an undue risk of instigating political strikes, so also the Regents may validly determine that members of the Communist Party are not qualified for the University's faculty because of their commitments to accept the Communist Party line in all areas thereby forsaking the free pursuit of truth and objective teaching.

As a postscript to the *Douds* case, it should be noted that in 1959 Congress repealed section 9(h) of the Labor-Management Relations Act (the statute involved in *Douds*) and replaced it with section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §504) making it a criminal offense for one who is or recently has been a Communist Party member to be a union officer. This Court held section 504 to be an unconstitutional bill of attainder in *United States v. Brown* (1965) 381 U.S. 437, 14 L.Ed.2d 484. In so ruling, however, this Court was careful to distinguish, rather than to overrule, *Douds* (381 U.S. at 457-458, 14 L.Ed.2d at 496-497). In the recent and significant case of *Bryson v. United States* (1969) 396 U.S. 64, 24 L.Ed.2d 264, this Court expressly stated that *Douds* has not been overruled. In the *Bryson* case, this Court refused to set aside the conviction of a union officer who had filed a false non-Communist affidavit with the National Labor Relations Board (the affidavit required by former section 9(h)) and in so doing observed:

> "We do not decide whether §9(h)—now repealed for over 10 years—would today pass constitutional muster, or whether *Douds* would instead be reaffirmed." (396 U.S. at 68, 24 L.Ed.2d at 268.)

Also indicative of the validity of the Regents' policy of excluding members of the Communist Party from the University's faculty is the recent decision of this Court holding constitutional the draft card burning law (*United States v. O'Brien* (1968) 391 U.S. 367, 20 L.Ed.2d 672). *O'Brien,* announces the following

general rule for determining the constitutionality of government regulations, such as Petitioner's policy in this case, involving incidental restrictions on First Amendment freedoms:

> ". . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. at 377, 20 L.Ed.2d at 680.)

Measured by these tests, it is apparent that the Regents' policy excluding members of the Communist Party from the University's faculty is valid, since:

1. The policy "is within the constitutional power of the Government" [i.e. the Regents], because faculty appointment policies clearly are within the scope of the Regents' constitutional authority pursuant to Article IX Section 9 of the California Constitution, granting to the Regents full powers of organization and government with respect to the University;

2. The policy "furthers an important or substantial governmental interest", which is reserving positions on the University's faculty for persons of academic integrity who are free to be impartial scholars and objective teachers;

3. "The governmental interest is unrelated to the suppression of free expression" because the policy is not in any way directed toward curbing freedom of

expression or association, but rather is based solely upon considerations of academic integrity; and

4. "The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest", since the policy is narrowly drawn to apply only to membership in the Communist Party. And, as discussed herein, persons who join and remain members of the Communist Party assume, and by their continuing membership continue to reaffirm, commitments to accept the Party line in all areas, thereby sacrificing impartial scholarship and objective teaching.

The considerations supporting the Regents' policy excluding members of the Communist Party from the University's faculty are supported by the illuminating analysis of the Communist Party, U.S.A. and the obligations of its members contained in the concurring and dissenting opinion of Justice Jackson in *American Communications Asso. v. Douds* (1950) 339 U.S. 382, 422-435, 94 L.Ed. 925, 956-963. As regards the issue presented in this case, the following extracts are especially germane:

> "Membership in the Communist Party is totally different. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. . . . Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute 'cells' in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.

"Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party." (339 U.S. at 432, 94 L.Ed. at 961.)

And

"There is certainly sufficient evidence that all members owe allegience to every detail of the Communist Party program and have assumed a duty actively to help execute it. . . ." (339 U.S. at 433, 94 L.Ed. at 962.)

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2. THE DECISION BELOW UNDERMINES THE AUTHORITY OF UNIVERSITIES FOR MAINTAINING CONDITIONS PROMOTING ACADEMIC FREEDOM

This Court has been sensitive to the need to maintain conditions of academic freedom in this nation's universities. As stated in *Keyishian v. Board of Regents of New York* (1967) 385 U.S. 589, 603, 17 L.Ed. 2d 629, 640:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ."

Or, as expressed in *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 250, 1 L.Ed.2d 1311, 1324:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and

> train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."

It is this very important interest of maintaining conditions of academic freedom which is served by the Regents' policy excluding members of the Communist Party from the University's faculty. The evidence is compelling that members of the Communist Party assume commitments to accept the party line in all areas at the price of surrender of intellectual integrity. Such commitments, and the abuse of educational trust which they require, are entirely inconsistent with basic principles of academic freedom. Because these commitments reflect lack of academic integrity, they disqualify the Communist Party member from serving on the University's faculty.

That members of the Communist Party are disqualified for reasons of professional ethics from serving on the University's faculty is evident from: (1) official determinations, (2) policies of leading educational associations, (3) the writings of eminent scholars and educators and (4) official statements of the Communist Party itself, all of which would be developed in the full briefing of this case. The basic import of these is reflected in the following examples:

The Association of American Universities, whose membership consists of the presidents of leading American Universities, in an official policy statement unanimously approved by its members calls for excluding members of the Communist Party from university faculties. In its publication, *The Rights and*

Responsibilities of Universities and Their Faculties, issued March 24, 1953, the Association states:

> "Appointment to a university position and retention after appointment require not only professional competence but involve the affirmative obligation of being diligent and loyal in citizenship. Above all, a scholar must have integrity and independence. This renders impossible adherence to such a regime as that of Russia and its satellites. No person who accepts or advocates such principles and methods has any place in a university. Since present membership in the Communist Party requires the acceptance of these principles and methods, such membership extinguishes the right to a university position."

The National Education Association in 1950 adopted as its policy the report of its Educational Policies Commission which concludes:

> "Members of the Communist Party of the United States should not be employed as teachers. Such membership, in the opinion of the Educational Policies Commission, involves adherence to doctrines and discipline completely inconsistent with the principles of freedom on which American education depends. Such membership, and the accompanying surrender of intellectual integrity render an individual unfit to discharge the duties of a teacher in this country . . . The whole spirit of free American education will be subverted unless teachers are free to think for themselves. It is because members of the Communist Party are required to surrender this right, as a consequence of becoming part of a movement characterized by conspiracy and deceit, that they should

be excluded from employment as teachers." (Reprinted in pamphlet, *Permit Communist-Conspirators to be Teachers?* United States Government Printing Office, Washington, 1953, House Document No. 213, 83rd Congress, 1st Session, page 16.)

Dr. Sidney Hook, distinguished philosopher, educator and Chairman of the Department of Philosophy at New York University, has written extensively on the question of whether members of the Communist Party should be disqualified from University faculties. He explains:

"Once in the Communist Party, as William Z. Foster points out, the teacher-member must do his best to rewrite the text-books in his field from the Communist Party point of view, win students and colleagues to this point of view, and mercilessly criticize opponents of Communist doctrine including his own past views. If a philosopher, to cite some actual instances, has accepted the theories of Mach or Carnap or Husserl or Alexander or T. H. Green or Whitehead or Dewey or G. E. Moore, upon joining the Communist Party he will criticize the philosophical doctrines he had previously held. He will never criticize the philosophy of dialectical materialism or the theories of Lenin and Stalin* whom he now regards as sacred philosophical authorities. If a physicist or mathematician becomes a member of the Communist Party he is required, wherever it is possible for him to do so, to relate his subject to the growth of technology, its impact upon social and class divisions, the class

*By party fiat, Stalin has since fallen from his exalted place.

uses to which the discovery is put, and the liberating role it can play in a Communist economy. The general theme is: science under capitalism makes for poverty, war and death; under communism, science makes for peace and abundance. Whatever his private beliefs may be, he cannot proclaim that there are any objective universal truths independent of country, class or even party, without running foul of the party line." (Hook, *Heresy, Yes, Conspiracy, No* (John Day Company, New York, 1953, pp. 202-203.)

CONCLUSION

It is not too much for the University to insist upon intellectual independence on the part of members of its faculty. Justice Frankfurter well expressed the great principle involved when he said in his concurring opinion in *Wieman v. Updegraff* (1952) 344 U.S. 183, 196, 97 L.Ed. 216, 225:

"The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

"To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they

must be exemplars of open-mindedness and free inquiry. *They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.* They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma." (Emphasis added.)

It is precisely because members of the Communist Party have assumed commitments which preclude such "open-mindedness and free inquiry" that they are disqualified from serving on the University's faculty.

For the reasons set forth above, a writ of certiorari should issue to review the judgment in this case of the Court of Appeal, State of California, Second Appellate District, Division Three.

Dated, Berkeley, California,
June 5, 1972.

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DONALD L. REIDHAAR,
Counsel for Petitioner.

(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
Second Appellate District

Division Three

2 Civil No. 38,410
(Superior Ct. No. 962388)

Kenneth L. Karst, David Kaplan, Douglas Glasgow, Webster Moore, and Harry Deutsch (Plaintiffs) and Angela Y. Davis (Plaintiff in Intervention),
Plaintiffs and Respondents,
vs.
The Regents of the University of California, a public corporation,
Defendant and Appellant.

OPINION

(Certified for nonpublication)

THE COURT:

The Regents of the University of California have appealed from a summary judgment in favor of the

plaintiff taxpayers and from a summary judgment in favor of the intervenor Angela Y. Davis.[1]

On October 3, 1969, the plaintiffs filed in the Superior Court of Los Angeles County a taxpayers' action against the Regents of the University of California. In the first cause of action the plaintiffs sought a declaratory judgment that certain resolutions of the Regents of October 11, 1940, June 24, 1949, and April 21, 1950, expressing the policy that any member of the Communist Party was barred from employment by the University of California, were invalid under the First and Fourteenth Amendments to the Constitution of the United States and that the expenditure of tax monies in the implementation of such resolutions constituted an impermissible use of public funds. It was alleged that a resolution had been adopted by the Regents on or about September 19, 1969, directing the president of the university to take steps to terminate the appointment as a faculty member at the university's Los Angeles campus of Angela Y. Davis who, in response to an inquiry by the university, had stated that she was then a member of the Communist Party; that termination proceedings with respect to Miss Davis were pending before a faculty Committtee on Privilege and Tenure on the Los Angeles campus; and that by "virtue of all of the foregoing, the University is now expending, and will continue to expend, tax monies in the implementation of the constitution-

[1]In *Regents of the University of California v. Superior Court*, 3 Cal.3d 529, the matter of venue for the action was determined.

ally invalid resolutions of October 11, 1940, June 24, 1949, and April 21, 1950."[2]

The second cause of action incorporated by reference all of the allegations of the first cause of action and contained further allegations as follows: "Defendant University is continuing and threatening, unless restrained, to continue to do the acts and things hereinbefore complained of. Said acts are causing, and, unless restrained, will continue to cause irreparable injury and damage to plaintiffs as taxpayers, in that said expenditures, once made, can never thereafter be recouped. Plaintiffs have no adequate remedy at law with respect to such injury and damage."

---

[2]The body of the resolution of June 24, 1949, was as follows:
"RESOLVED THAT
"At its birth the University was dedicated to the search for truth and its full exposition.
"The primary obligation of The Regents of the University of California has been to stand steadfastly for that freedom of the human mind and spirit which has enabled the assemblage of distinguished scholars constituting the faculty to continue to pursue these objectives.
"The Regents gladly share with the faculty the responsibility to keep the University free from those who would destroy this freedom.
"Today this freedom is menaced on a world-wide basis by the Communist Party through its determination by fraud, or otherwise, to establish control by the State over the thoughts and expression of thoughts by the individual.
"Therefore, the Regents reaffirm their declaration of policy adopted in 1940 that membership in the Communist Party is incompatible with objective teaching and with search for the truth.
"Pursuant to this policy the Regents direct that no member of the Communist Party shall be employed by the University.
"Any person who is or shall become a member of the Communist Party or otherwise undertakes obligations or advocates doctrines inconsistent with this policy shall, after the facts have been established by the University Administration, and after the traditional consultation with the Committee on Privilege and Tenure of the Academic Senate in cases of members of the faculty, be deemed to have severed his connection with the University."

On October 7, 1969, the plaintiffs filed a notice of a motion for a summary judgment to be heard on October 20, 1969. (Code Civ. Proc., § 437c.) The ground of the motion was stated to be that there was no defense to the action. With respect to the constitutional contention, reliance was placed on the reasoning of *Keyishian v. Board of Regents,* 385 U.S. 589, *Elfbrandt v. Russell,* 384 U.S. 11, and *Vogel v. County of Los Angeles,* 68 Cal.2d 18.

On October 9, 1969, pursuant to leave of the court, Angela Y. Davis filed a complaint in intervention. Therein she adopted by reference the major portion of the complaint theretofore filed. She alleged that there was no issue of fact before the Committee on Privilege and Tenure and the Regents with respect to the matter of the termination of her employment since she had admitted the only fact alleged in the statement of charges, namely, her membership in the Communist Party. She further alleged that the proceedings to terminate her employment were directed to the accomplishment of unconstitutional objects in that her constitutional rights, which she specified in detail, would thereby be violated. The intervenor further alleged: "By reason of the facts alleged herein Intervenor has an interest in the subject matter of the Complaint and Intervenor claims what is sought in said Complaint; any determination of said subject matter and said claims must directly and unavoidably affect Intervenor's interest in her employment, her right to teach, and her freedom of expression and association."

On October 10, 1969, the intervenor, having obtained an order shortening time for service, filed a notice of

motion for summary judgment to be heard on October 20, 1969, together with points and authorities and a declaration in support thereof.

On October 10, 1969, the Regents filed a general demurrer to each cause of action of the complaint. On that date the Regents also filed a declaration of their general counsel in opposition to the plaintiffs' motion for summary judgment. A similar declaration in opposition to the intervenor's motion for summary judgment was filed on October 17, 1969. The purpose of each declaration was to show that there were "at least" two triable issues of fact, those issues being stated to be as follows:

> "(1) Are all members of the Communist Party committed to accept and implement the Party line and dogma?
>
> (2) And, if so, are such commitments incompatible with serving as a faculty member of the University of California?"

On October 20, 1969, the demurrer of the Regents to the complaint was overruled and the motion of the plaintiffs for summary judgment was granted. The motion of the intervenor for summary judgment was submitted on October 20, 1969, and was granted on October 21, 1969.

The summary judgment in favor of the plaintiffs was entered on October 21, 1969. A portion thereof was as follows: "A. The resolutions of the defendant Regents of the University of California which are dated October 11, 1940, June 24, 1949, and April 21, 1950 (and which are annexed hereto and incorporated

herein by this reference as Exhibits A, B and C respectively) as well as the implementing resolutions of the defendant, in respect of Intervenor, Angela Y. Davis, dated September 19, 1969 and October 3, 1969 (which are annexed hereto and incorporated herein by this reference as Exhibits D and E respectively) are hereby declared to be in violation of Article I, Sections 9 and 10, of the California Constitution, and of the First and Fourteenth Amendments of the Constitution of the United States of America, because they automatically exclude from faculty employment by the University of California, solely by virtue of such membership, any person who is a member of the Communist Party. Accordingly, any and all expenditures of public funds with a purpose, "whether direct or indirect, of implementing any of defendant's said resolutions are hereby declared to be illegal."

The summary judgment in favor of the intervenor was entered on October 24, 1969. A portion of that judgment was substantially identical to the portion of the judgment in favor of the plaintiffs quoted hereinabove, except for the quoted part thereof relating to the expenditure of public funds.

At oral argument all parties agreed that Miss Davis was not reappointed for a second year. However, the appeal from the judgments presents a question of continuing importance, namely, the constitutional validity of the resolutions of the Regents of October 11, 1940, June 24, 1949, and April 21, 1950. Consequently, the appeal from the judgments should not be dismissed as moot. (See *DiGiorgio Fruit Corp. v. Dept. of Employment,* 56 Cal.2d 54, 58.)

It is manifest that the judgments are sustained by the reasoning of *Keyishian v. Board of Regents,* supra, 385 U.S. 589, *Elfbrandt v. Russell, supra,* 384 U.S. 11, and *Vogel v. County of Los Angeles, supra,* 68 Cal.2d 18. This court as an intermediate court of appellate review is bound by that reasoning. Consequently, a plenary discussion in this opinion of the arguments made on behalf of the Regents would serve no purpose.

The judgments are affirmed.

ALLPORT, J.—I dissent.

The issues raised by the complaint in intervention are conceded by all concerned to be moot. I would therefore dismiss the appeal from the summary judgment heretofore entered in favor of Angela Y. Davis.

I would reverse the summary judgment heretofore entered in favor of the "Taxpayers" Karst, Kaplan, Glasgow, Moore and Deutsch. The rules applicable to the summary judgment procedure are succinctly stated in *Snider v. Snider,* 200 Cal.App.2d 741, 747-748, as follows: "'Well-settled principles of law define the nature and purpose of the procedure set forth in section 437c of the Code of Civil Procedure, and guide us in our task of reviewing the sufficiency of the affidavits. It "provides a method by which, if the pleadings are not defective, the court may determine whether the triable issues apparently raised by them are real or merely the product of adept pleading." (*Coyne v. Krempels,* 36 Cal.2d 257, 262 [223 P.2d 244].) "While it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the

court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action exists. . . ." (*Cone v. Union Oil Co.*, 129 Cal.App.2d 558, 562 [277 P.2d 464].) As we stated in *Burke v. Hibernia Bank*, 186 Cal.App.2d 739, 744 [9 Cal.Rptr. 890]: "The summary judgment procedure seeks to discover, through the media of affidavits, whether the parties possess evidence which demands the analysis of trial." Witkin in his work on California Procedure (vol. 2, pp. 1711-1715) points out that the purpose of the procedure is to discover proof and thus challenge its sufficiency in support of the allegations of the pleadings. [¶] Equally well-settled principles guide us in our task of examining the sufficiency of the affidavits prescribed by the section. At the outset we recognize the admonition of the Supreme Court in *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 556 [122 P.2d 264]: "The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." (See *Walsh v. Walsh, supra* [18 Cal.2d 439 (116 P.2d 62).] [¶] "For these reasons it may further be said that the affidavits of the moving party, the plaintiff in this case, should be strictly construed and those of his opponent, liberally construed." (See also *McComsey v. Leaf*, 36 Cal.App.2d 132 [97 P.2d 242]; *Nini v. Culberg*, 183 Cal.App.2d 657, 661 [7 Cal.Rptr. 146].) If, after an examination of the affidavits, doubt exists as to whether summary judgment should be granted, such doubt should be resolved against the moving party. (*Whaley v. Fowler*, 152 Cal.App.2d 379,

381 [313 P.2d 97]; *House v. Lala,* 180 Cal.App.2d 412, 415 [4 Cal.Rptr. 366]; *Travelers Indemnity Co. v. McIntosh,* 112 Cal.App.2d 177, 182 [245 P.2d 1065].) But, on the other hand, as we stated in *Burke v. Hibernia Bank, supra,* 186 Cal.App.2d at page 744: "a summary judgment will stand if the supporting affidavits state facts sufficient to sustain a judgment and the counteraffidavits do not proffer competent and sufficient evidence to present a triable issue of fact. (*Coyne v. Krempels* (1950) 36 Cal.2d 257, 261 [223 P.2d 244]; Code Civ. Proc., § 437c.)"'" While a summary judgment may, in some instances, be considered prior to the filing of an answer, *Snider v. Snider, supra,* 746-747, to do so accentuates the need for the use of caution when resorting to use of such a "drastic" procedure in effecting judgment. The existence of triable issues of fact may well have been raised in that responsive pleading itself. (*Fresno City High School Dist. v. Dillon,* 34 Cal.App.2d 636, 640-641.) In my opinion the "pleadings" in the case at bar, supplemented by the declaration filed on behalf of the Regents, presented triable issues of fact and that to grant a summary judgment herein was not only error but, to do so prior to answer, was an abuse of discretion on the part of the trial court.

Article III, section 3, of the Constitution of the United States defines treason as ". . . adhering to their Enemies, giving them Aid and Comfort." A plenary examination of the communist dogma, its objectives and the conduct of a Communist Party member in connection therewith while on the teaching faculty of

the University pose potentially valid constitutional grounds for the exclusion of such a person from such a position. Additional descriptive language need not attach to the Communist Party designation in the resolutions themselves to raise triable issues of fact. I am unable to subscribe to the view that the resolutions herein were, as a matter of law, violative of the California or United States Constitutions. The position which the majority feels compelled to take herein suggests the need for an immediate reevaluation of the subject in the light of current events, the constitutional provision referred to herein, the cases of *Adler v. Board of Education of the City of New York,* 342 U.S. 485 [96 L.Ed. 517, 72 S.Ct. 380]; *Pockman v. Leonard,* 39 Cal.2d 676, and the reasoning of the minority in *Keyishian, Elfbrandt* and *Vogel.* The desirability of such was given impetus by Mr. Justice Clark in his dissenting opinion in *Keyishian v. Board of Regents of New York,* 385 U.S. 589 [17 L.Ed.2d 629, 87 S.Ct. 675], concurred in by Justices Harlan, Stewart and White, wherein he said at pages 620-621: "The blunderbus fashion in which the majority couches 'its artillery of words,' together with the morass of cases it cites as authority and the obscurity of their application to the question at hand, makes it difficult to grasp the true thrust of its decision."

Filed January 26, 1972.

Clay Robbins, Jr., Clerk.

Appendix B

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Telephone: 879-2600
Attorneys for Plaintiffs

Superior Court of the State of California
for the County of Los Angeles

No. 962 388

Kenneth L. Karst, David Kaplan, Douglas Glasgow, Webster Moore, and Harry Deutsch,
Plaintiffs,
vs.
Regents of the University of California, a corporation,
Defendant.

[Oct. 21, 1969]

SUMMARY JUDGMENT
pursuant to Section 437c of the Code of Civil Procedure

This cause having come on regularly to be heard in Department 59 of the above-entitled Court, the Hon. Jerry Pacht, Judge presiding, on October 20, 1969, pursuant to duly noticed motion for summary

judgment, Charles H. Phillips and Richard H. Borow appearing for the moving parties, and Donald L. Reidhaar, Warren S. Levin, and William H. McKenzie appearing for the responding party, and John T. McTernan appearing for the intervenor; and the Court having considered the pleadings, the documents presented and filed with respect to the motion and particularly the affidavits or declarations, and having heard and considered the contentions of counsel; and the Court having heretofore granted the said motion on the statutory ground that there is no defense to the action and that no triable issue of fact is presented:

It is Ordered, Adjudged, and Decreed, that:

A. The resolutions of the defendant Regents of the University of California which are dated October 11, 1940, June 24, 1949, and April 21, 1950 (and which are annexed hereto and incorporated herein by this reference as Exhibits A, B and C respectively) as well as the implementing resolutions of the defendant, in respect of Intervenor, Angela Y. Davis, dated September 19, 1969 and October 3, 1969 (which are annexed hereto and incorporated herein by this reference as Exhibits D and E respectively) are hereby declared to be in violation of Article I, Sections 9 and 10, of the California Constitution, and of the First and Fourteenth Amendments of the Constitution of the United States of America, because they automatically exclude from faculty employment by the University of California, solely by virtue of such membership, any person who is a member of the Communist Party.

Accordingly, any and all expenditures of public funds with a purpose, whether direct or indirect, of implementing any of defendant's said resolutions are hereby declared to be illegal.

B. The additional illegal expenditure of public funds will continue to cause irreparable injury and damage to plaintiffs as taxpayers for which they have no adequate remedy at law. Accordingly, defendant, its agents, servants, representatives and employees, and all persons acting in concert or participation with it, and all those who shall have actual knowledge of this Decree, shall be, and they hereby are, permanently enjoined and restrained from, in any manner and by any means, whether direct or indirect, expending or utilizing public funds, public materials and equipment, and the time and energies of paid public employees for the purpose of implementing the said resolutions of The Regents of the University of California dated October 11, 1940, June 24, 1949, April 21, 1950, September 19, 1969, and October 3, 1969, annexed hereto.

C. This order shall not be construed to apply to defendant, its attorneys, agents, servants, representatives or employees in taking or maintaining legal action seeking resolution of the matters involved in this litigation.

D. Plaintiffs recover of defendant their costs of suit herein in the sum of $33.50.

Dated, October 21, 1969.

Jerry Pacht,
Judge of the Superior Court.

Exhibit A

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That:

The Regents believe that the Communist Party . . . gives its first loyalty to a foreign political movement and, perhaps, to a foreign government; that by taking advantage of the idealism and inexperience of youth, and by exploiting the distress of underprivileged groups, it breeds suspicion and discord, and thus divides the democratic forces upon which the welfare of our country depends. They believe, therefore, that membership in the Communist Party is incompatible with membership in the faculty of a State University. Tolerance must not mean indifference to practices which contradict the spirit and the purposes of the way of life to which the University of California as an instrument of democracy is committed.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of the The Regents of the University of California, a corporation, adopted at a duly called meeting thereof on October 11, 1940, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolu-

tion; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman,

Secretary of
The Regents of the University
of California

Exhibit B

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

At its birth the University was dedicated to the search for truth and its full exposition.

The primary obligation of The Regents of the University of California has been to stand steadfastly for that freedom of the human mind and spirit which has enabled the assemblage of distinguished scholars constituting the faculty to continue to pursue these objectives.

The Regents gladly share with the faculty the responsibility to keep the University free from those who would destroy this freedom.

Today this freedom is menaced on a world-wide basis by the Communist Party through its determination by fraud, or otherwise, to establish control by the State over the thoughts and expression of thoughts by the individual.

Therefore, the Regents reaffirm their declaration of policy adopted in 1940 that membership in the Communist Party is incompatible with objective teaching and with search for the truth.

Pursuant to this policy the Regents direct that no member of the Communist Party shall be employed by the University.

Any person who is or shall become a member of the Communist Party or otherwise undertakes obligations or advocates doctrines inconsistent with this policy shall, after the facts have been established by the University Administration, and after the traditional consultation with the Committee on Privilege and Tenure of the Academic Senate in cases of members of the faculty, be deemed to have severed his connection with the University.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of The Regents of the University of California, a corporation, adopted at a duly called meeting thereof on June 24, 1949, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman,

Secretary of
The Regents of the University
of California.

Exhibit C

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

The Regents of the University of California confirm and emphasize their policy designed to bar members of the Communist Party from employment by the University as members of the faculty or otherwise, as embodied in various statements and resolutions including those of October 11, 1940 and June 24, 1949, which policy is hereby reaffirmed. The Regents are gratified that the Academic Senate, both Northern and Southern sections, has concurred in this policy by an overwhelming vote, reported on March 22, 1950.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of The Regents of the University of California, a corporation, adopted at a duly called meeting thereof on April 21, 1950, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman,

Secretary of
The Regents of the University
of California.

Exhibit D

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

Whereas, on October 11, 1940, The Regents adopted a Resolution stating that "membership in the Communist Party is incompatible with membership in the faculty of a State University"; and

Whereas, on June 24, 1949, The Regents reaffirmed and amplified that policy with a Resolution stating, in part, "pursuant to this policy, The Regents direct that no member of the Communist Party shall be employed by the University"; and

Whereas, in an action reported March 22, 1950, the Academic Senate, Northern and Southern Sections, concurred in the foregoing policy by adopting a resolution that proved members of the Communist Party are not acceptable as members of the faculty; and

Whereas, on April 21, 1950, The Regents adopted a Resolution confirming and emphasizing their policy statements of October 11, 1940, and June 24, 1949; and

Whereas, it has been reported to The Regents that Angela Y. Davis was recently appointed as a member of the University faculty, and subsequently she informed the University Administration by letter, stating, among other things, that she is a member of the Communist Party;

Now, Therefore, The Regents direct the President to take steps to terminate Miss Davis' University appointment in accordance with regular procedures as prescribed in the Standing Orders of The Regents.

This Is To Certify that the foregoing is a full, true, and correct copy of a resolution of The Regents of The University of California, a corporation, adopted at a duly called meeting thereof on September 19, 1969, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman,

Secretary of
The Regents of the University
of California.

Exhibit E

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

Whereas, as stated in policies of The Regents "membership in the Communist Party is incompatible with membership in the faculty of a State University; and

Whereas, The Regents at their meeting of September 19, 1969, after being advised that Acting Assistant Professor Angela Y. Davis had acknowledged membership in the Communist Party, directed the President to take steps to terminate Miss Davis' University appointment in accordance with regular procedures as prescribed in the Standing Orders of The Regents; and

Whereas, The Regents were informed at the time of taking that action that Miss Davis would not be engaged in teaching during the Fall Quarter and therefore took no action to specifically prohibit teaching activity; and

Whereas, subsequent to The Regents meeting of September 19, 1969, it was announced that Miss Davis has been assigned to teach a University course during the Fall quarter commencing October 6, 1969; and

Whereas, there may be some delay before the conclusion of hearing procedures relating to Miss Davis; and

Whereas, in the interim it is deemed appropriate and desirable that Miss Davis not engage in teaching activities as was The Regents' intention at the time of their September 19 action; and

Whereas, The Regents do not wish Miss Davis to suffer financial hardship pending the outcome of University hearing procedures;

Now, Therefore, Be it Resolved, that The Regents instruct the President that during the Fall quarter of 1969 Miss Davis shall be assigned no teaching duties, and that she shall not be authorized to give instruction in any course under the jurisdiction of any school, college, department or other academic agency approved by The Regents.

Be It Further Resolved, that during the period of appropriate University hearing procedures she shall continue to be compensated as provided in her employment contract.

This Is To Certify that the foregoing is a full, true, and correct copy of a resolution of The Regents of the University of California, a corporation, adopted at a duly called meeting thereof on October 3, 1969, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman,

Secretary of
The Regents of the University
of California.

Appendix C

Margolis and McTernan
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DUnkirk 5-6111
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Superior Court of the State of California
For the County of Los Angeles

No. 962 388

Kenneth L. Karst, David Kaplan, Douglas Glasgow, Webster Moore, and Harry Deutsch,
Plaintiffs,

vs.

Regents of the University of California, a corporation,
Defendant.

Angela Y. Davis,
Intervenor.

(October 24, 1969)

SUMMARY JUDGMENT

Pursuant To Section 437c of the
Code of Civil Procedure

This cause having come on regularly to be heard in Department 59 of the above entitled court, the Honorable Jerry Pacht, Judge presiding, on October 20,

1969, pursuant to duly noticed Motion for Summary Judgment by Intervenor, John T. McTernan, Esq., appearing for Intervenor, Charles H. Phillips, Esq. and Richard H. Borow, Esq., appearing for Plaintiffs, and Thomas J. Cunningham, Esq., General Counsel of The Regents of the University of California by Donald L. Reidhaar, Esq., Warren S. Levin, Esq., and William H. McKenzie, Esq., appearing for the Defendant; and the Court having considered the pleadings and the declarations presented and filed with respect to the motion, and having heard and considered the contentions of counsel; and the Court having granted the said Motion for Summary Judgment on the statutory ground that there is no defense to the action and that no triable issue of fact is presented:

It Is Ordered, Adjudged and Decreed That:

A. The resolutions of the defendant Regents of the University of California which are dated October 11, 1940, June 24, 1949, and April 21, 1950 (and which are annexed hereto and incorporated herein by this reference as Exhibits A, B and C respectively) as well as the resolutions of the defendant, in respect of Intervenor, Angela Y. Davis, dated September 19, 1969 and October 3, 1969 (which are annexed hereto and incorporated herein by this reference as Exhibits D and E respectively) are hereby declared to be in violation of the First and Fourteenth Amendments of the Constitution of the United States of America and of Article I, Sections 9, 10, 11 and 13 of the Constitution of the State of California, because they automatically exclude from faculty employment by the University

of California, solely by virtue of such membership, any person who is a member of the Communist Party; and all proceedings to terminate Intervenor's University appointment for cause under Standing Order No. 102.2(j) of defendant Regents of the University of California, and all matters, transactions and things done, undertaken, or caused to be done or undertaken, to abridge, interfere with, restrain or obstruct Intervenor's engaging in teaching duties pursuant to her University appointment, or being authorized to give instruction in any course under the jurisdiction of any school, college, department or other academic agency approved by defendant Regents of the University of California, or in all respects exercising, using and enjoying the rights, privileges and powers of Intervenor's appointment, solely on the grounds of Intervenor's membership in the Communist Party, or by way of effectuation of said Resolutions, or any of them, are hereby declared to be in violation of the aforesaid provisions of the Constitutions of the United States of America and the State of California.

B. The proceedings to terminate Intervenor's University appointment, and the termination of said appointment, and any interference with, abridgement, restraint or obstruction of her authorization to give instruction in any course under the jurisdiction of any school, college, department or other academic agency approved by the defendant Regents of the University of California, and of the rights, privileges and powers of Intervenor's University appointment, solely on the grounds of Intervenor's membership in the Communist

Party, will continue to cause irreparable injury and damage to Intervenor for which she has no adequate remedy at law. Accordingly, defendant, its agents, servants, representatives and employees, and all persons acting in concert or participation with it, and all those who shall have actual knowledge of this Decree, shall be, and they hereby are, permanently enjoined and restrained from, in any manner and by any means, whether direct or indirect, for reasons based solely upon Intervenor's membership in the Communist Party, or upon the implementation or effectuation of said Resolutions of the Regents of the University of California dated October 7, 1940, June 24, 1949, April 21, 1950, September 19, 1969, and October 3, 1969, annexed hereto,

(1) Terminating Intervenor's University appointment aforesaid, or causing or bringing about the termination thereof;

(2) Interfering with, abridging, restraining or obstructing Intervenor in undertaking, performing or engaging in teaching duties pursuant to her University appointment, in giving instruction in any course under the jurisdiction of any school, college, department or other academic agency approved by the defendant, and in all respects exercising, using and enjoying all the rights, privileges and powers of her University appointment.

C. This Order shall not be construed to apply to defendant, its attorneys, agents, servants, representa-

tives or employees in taking or maintaining legal action seeking resolution of the matters involved in this litigation.

D. Intervenor shall recover of defendant her costs of suit herein in the sum of $17.50.

Dated, October 24, 1969.

Jerry Pacht,

Judge of the Superior Court.

Exhibit A

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That:

The Regents believe that the Communist Party . . . gives its first loyalty to a foreign political movement and, perhaps, to a foreign government; that by taking advantage of the idealism and inexperience of youth, and by exploiting the distress of underprivileged groups, its breeds suspicion and discord, and thus divides the democratic forces upon which the welfare of our country depends. They believe, therefore, that membership in the Communist Party is incompatible with membership in the faculty of a State University. Tolerance must not mean indifference to practices which contradict the spirit and the purposes of the way of life to which the University of California as an instrument of democracy is committed.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of The Regents Of The University Of California, a corporation, adopted at a duly called meeting thereof on October 11, 1940, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolu-

tion; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman
Secretary of
The Regents of the University
of California

Exhibit B

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

At its birth the University was dedicated to the search for truth and its full exposition.

The primary obligation of The Regents of the University of California has been to stand steadfastly for that freedom of the human mind and spirit which has enabled the assemblage of distinguished scholars constituting the faculty to continue to pursue these objectives.

The Regents gladly share with the faculty the responsibility to keep the University free from those who would destroy this freedom.

Today this freedom is menaced on a world-wide basis by the Communist Party through its determination by fraud, or otherwise, to establish control by the State over the thoughts and expression of thoughts by the individual.

Therefore, the Regents reaffirm their declaration of policy adopted in 1940 that membership in the Communist Party is incompatible with objective teaching and with search for the truth.

Pursuant to this policy the Regents direct that no member of the Communist Party shall be employed by the University.

Any person who is or shall become a member of the Communist Party or otherwise undertakes obligations or advocates doctrines inconsistent with this policy shall, after the facts have been established by the University Administration, and after the traditional consultation with the Committee on Privilege and Tenure of the Academic Senate in cases of members of the faculty, be deemed to have severed his connection with the University.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of The Regents Of The University Of California, a corporation, adopted at a duly called meeting thereof on June 24, 1949, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman
Secretary of
The Regents of the University
of California

Exhibit C

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

The Regents of the University of California confirm and emphasize their policy designed to bar members of the Communist Party from employment by the University as members of the faculty or otherwise, as embodied in various statements and resolutions including those of October 11, 1940 and June 24, 1949, which policy is hereby reaffirmed. The Regents are gratified that the Academic Senate, both Northern and Southern sections, has concurred in this policy by an overwhelming vote, reported on March 22, 1950.

This Is To Certify that the foregoing is a full, true, and correct copy of the relevant portion of a resolution of The Regents Of The University Of California, a corporation, adopted at a duly called meeting thereof on April 21, 1950, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman
Secretary of
The Regents of the University
of California

Exhibit D

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

Whereas, on October 11, 1940, The Regents adopted a Resolution stating that "membership in the Communist Party is incompatible with membership in the faculty of a State University"; and

Whereas, on June 24, 1949, The Regents reaffirmed and amplified that policy with a Resolution stating, in part, "pursuant to this policy, The Regents direct that no member of the Communist Party shall be employed by the University"; and

Whereas, in an action reported March 22, 1950, the Academic Senate, Northern and Southern Sections, concurred in the foregoing policy by adopting a resolution that proved members of the Communist Party are not acceptable as members of the faculty; and

Whereas, on April 21, 1950, The Regents adopted a Resolution confirming and emphasizing their policy statements of October 11, 1940, and June 24, 1949; and

Whereas, it has been reported to the Regents that Angela Y. Davis was recently appointed as a member of the University faculty, and subsequently she informed the University Administration by letter, stating, among other things, that she is a member of the Communist Party;

Now, Therefore, The Regents direct the President to take steps to terminate Miss Davis' University appointment in accordance with regular procedures as prescribed in the Standing Orders of The Regents.

This Is To Certify that the foregoing is a full, true, and correct copy of a resolution of The Regents Of The University Of California, a corporation, adopted at a duly called meeting thereof on September 19, 1969, at which a quorum of said Regents was present and acting; that a majority of the Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman
Secretary of
The Regents of the University
of California

Exhibit E

RESOLUTION OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Resolved That

Whereas, as stated in policies of The Regents "membership in the Communist Party is incompatible with membership in the faculty of a State University"; and

Whereas, The Regents at their meeting of September 19, 1969, after being advised that Acting Assistant Professor Angela Y. Davis had acknowledged membership in the Communist Party, directed the President to take steps to terminate Miss Davis' University appointment in accordance with regular procedures as prescribed in the Standing Orders of The Regents; and

Whereas, The Regents were informed at the time of taking that action that Miss Davis would not be engaged in teaching during the Fall quarter and therefore took no action to specifically prohibit teaching activity; and

Whereas, subsequent to The Regents meeting of September 19, 1969, it was announced that Miss Davis has been assigned to teach a University course during the Fall quarter commencing October 6, 1969; and

Whereas, there may be some delay before the conclusion of hearing procedures relating to Miss Davis; and

Whereas, in the interim it is deemed appropriate and desirable that Miss Davis not engage in teaching

activities as was The Regents' intention at the time of their September 19 action; and

Whereas, The Regents do not wish Miss Davis to suffer financial hardship pending the outcome of University hearing procedures;

Now, Therefore, Be It Resolved, that The Regents instruct the President that during the Fall quarter of 1969 Miss Davis shall be assigned no teaching duties, and that she shall not be authorized to give instruction in any course under the jurisdiction of any school, college, department or other academic agency approved by The Regents.

Be It Further Resolved, that during the period of appropriate University hearing procedures she shall continued to be compensated as provided in her employment contract.

This Is To Certify that the foregoing is a full, true, and correct copy of a resolution of The Regents Of The University Of California, a corporation, adopted at a duly called meeting thereof on October 3, 1969, at which a quorum of said Regents was present and acting; that a majority of The Regents present voted in favor of said resolution; and that the said resolution has not been annulled or revoked, but is still in full force and effect.

Dated this 10th day of October, 1969.

(Seal)

/s/ Marjorie J. Woolman
Secretary of
The Regents of the University
of California

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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971
No. 71-1609

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, a public
corporation,

Petitioner,

vs.

KENNETH L. KARST, et al.,

Respondents.

BRIEF FOR RESPONDENT ANGELA Y. DAVIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's cursory statement of the case omits important facts and seriously blurs the issue. Respondent Davis was a member of the faculty at U.C.L.A. when Petitioner, by virtue of its long-standing

policy not to employ members of the Communist Party,[1] made inquiry of her concerning her alleged membership in the Party. She replied by letter to the effect that she was a member of the Communist Party and that this membership carried with it no commitment at war with her professional responsibilities.(C.T. 10, 11). Thereafter Petitioner directed that proceedings to effect Respondent Davis' termination be instituted. Both The Regents' resolution to this effect (C.T. 14; Pet.App. pp. xxxv-xxxvi) and President Hitch's Statement of Charges initiating the termination proceedings (C.T. 12) make abundantly plain that Davis' termination was intended solely by reason of her membership in the Communist Party. Neither in the charges made nor at any stage in the termination proceeding (to the point where the same was ended by the trial court's judgment) was any issue tendered or evidence received concerning Miss Davis' personal conduct as a teacher

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1/ The Regents' resolutions to this effect will be found at C.T. 172, 173, 174. They are also set out as Exhibits A, B, C and D attached to the judgment of the trial court, Pet.App. pp. xxviii to xxxvi.

or scholar or her personal characteristics as respects her fitness to teach. Contrary to the implications in the language of Mr. Justice Allport quoted by Petitioner (Pet. p. 4) the termination proceedings would not and could not have constituted "plenary examination of the communist dogma, its objectives and the conduct of the Communist Party member in connection therewith while on the teaching faculty of the University . . .".

It was after the initiation of these termination proceedings that the instant action was brought. The Complaint (C.T. 1-14) sought a declaration that The Regents' resolutions were unconstitutional because they forbade employment of communists by the University solely because of their membership in the Communist Party, and an injunction against implementation of those resolutions on account of their constitutional infirmities. Respondent Davis' Complaint in Intervention (C.T. 29-37) was bottomed upon the same grounds and sought relief that was similar but which extended to forbidding interference with her rights and privileges as a member of the U.C.L.A.

faculty. The two judgments below (C.T. 169, 178) declared The Regents' resolutions unconstitutional because they barred employment on grounds of membership in the Communist Party standing alone and forbade termination proceedings grounded solely on such membership. Plainly these judgments would not bar the University from terminating Respondent Davis for "conduct" as a "Communist Party member" in connection with "communist dogma" while "on the teaching faculty of the University" if the same were such as to disqualify her. But to terminate Davis upon such grounds would have required different charges and a different hearing. Charges of this kind were never made.

ISSUE PRESENTED

The issue here, then, is whether Petitioner can deny employment to a member of its faculty solely by reason of membership in the Communist Party standing alone. Petitioner here, as well as below and in the termination proceedings against Respondent Davis, would draw inferences of lack of academic integrity and opposition to the principles of academic freedom from the

mere fact of such membership. Thus, in a more refined and precise form, the question is whether, consistent with First Amendment freedoms and rudimentary due process, Petitioner can deny employment to a member of its faculty by drawing against such member the inferences just stated from the mere fact of her membership in the Communist Party.

THE WRIT SHOULD NOT BE GRANTED

There are no reasons for granting the writ. The constitutional principles governing this case have been long determined by this Court. The majority below found this to be "manifest" from this Court's decisions in Keyishian v. Board of Regents, 385 U.S. 589, 17 L.ed.2d 629 (1967) and Elfbrandt v. Russell, 384 U.S. 11, 16 L.ed.2d 321 (1966).

ARGUMENT

Petitioner's position rests upon the thesis that while the requirements of the First Amendment and due process forbid inferring "disloyalty" from mere membership

in the Communist Party, they do not prevent inferring academic disqualification from such membership. The short answer is that the Constitution forbids drawing any inferences of individual disqualification from such membership. Guilt by association chills free speech and offends due process.

1. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Gravely Abridges First Amendment Safeguards.

Keyishian v. Board of Regents, 385 U.S. 589, 17 L.ed.2d 629, involved provisions of the New York Feinberg Law which made Communist Party membership as such prima facie evidence of disqualification of teachers in the State University of New York, as well as other state-owned and operated institutions of higher learning. There is nothing in the Court's opinion to indicate that this proscription was based or justified on "loyalty" considerations alone. This Court weighed its constitutional validity in relation to the qualifications to teach "captive audiences of young minds" and its

"stifling effect on the academic mind." (385 U.S. at 607, 17 L.ed.2d at 643.) The objectives of the New York Regents were (as are those of the California Regents here) the "elimination and non-appointment of 'Communists' from or to our teaching ranks." (385 U.S. at 608, 17 L.ed.2d at 644.) The statute was held to be overbroad for the very reason that it permitted mere membership to be the basis for inferring that a particular individual had characteristics disqualifying him to teach. In this form the Court found the statute offensive to the First Amendment guarantee of free association and free expression. The Court held that the statute could not make membership a basis for denial of any public position unless that membership was related to knowledge of unlawful organizational goals and a "'specific intent' to further the illegal aims of the organization." (385 U.S. at 607, 610, 17 L.ed.2d at 643, 644.)

To the same effect upon undistinguishable facts is Elfbrandt v. Russell, 384 U.S. 11, 16, 19, 16 L.ed.2d 321, 324-326. Both cases rest upon the principle that

membership may be innocent and the only kind of membership which can, consistent with the First Amendment, disqualify for public employment is that accompanied with specific intent to further illegal aims of the organization in question.

In United States v. Robel, 389 U.S. 258, 19 L.ed.2d 508 (1967), it was held impermissible on First Amendment grounds to convict a member of the Communist Party for remaining in employment in a defense facility following a finding under the Subversive Activities Control Act (50 U.S.C. §780 et seq.) that the Communist Party was a Communist action organization and under final order to register as such pursuant to that statute. The individual was charged with violation of 50 U.S.C. §784(a)(1)(D) by reason of having continued his employment at a shipyard in Seattle while a member of the Communist Party. The section was held to contain the "fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." (389 U.S. at 266, 19 L.ed.2d at 515.) The

overbreadth lay in the fact that the statute's prohibition was not limited to membership accompanied with specific intent to further unlawful goals. Lacking this limitation the statute was held to impinge fatally upon the "individual's right of association which is protected by the provisions of the First Amendment." (389 U.S. at 263, 266, 19 L.ed.2d at 513, 515.) The essence of the holding, then, is that the First Amendment forbids drawing against the individual inferences of proscribable purpose which had been found against the organization when those inferences are based only on his membership. To hold otherwise would establish "guilt by association alone." (389 U.S. at 265, 19 L.ed.2d at 515.)

The evil of overly broad rules disqualifying for employment or visiting other sanctions on grounds of mere membership in the Communist Party lies in more than the sanction visited upon the individual victim. The overbreadth so chills the exercise of First Amendment freedoms as seriously to impair them for all who fall within its sweep, actual or potential. Thus people

generally will refrain from associations that may bring them within the ambit of the rule in question. Keyishian v. Board of Regents, 385 U.S. at 609, 17 L.ed.2d at 644; Baggett v. Bullitt, 377 U.S. 360, 373, 12 L.ed.2d 377, 385 (1964); Elfbrandt v. Russell, 384 U.S. 11,16-17, 16 L.ed.2d 321,325.

2. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Offends Due Process.

Overbreadth in the terms discussed above also deprives its victim of due process. As was held in Wieman v. Updegraf, 344 U.S. 183, 190-191, 97 L.ed. 216, 222 (1952), where "membership alone disqualifies" there is "[i]ndiscriminate classification of innocent with knowing activity" and is fatal as "an assertion of arbitrary power" which "offends due process." There state college teachers who had refused to take an oath of non-membership in specified organizations, which was not limited to their knowledge of improper objectives on the part of any of the organizations, were later refused an opportunity to take the oath (and thus

continue in their employment) when the highest State court had glossed upon it the element of the oath-taker's knowledge of proscribable objectives. This Court held that innocent and knowing activity had thus been indiscriminately given the same consequences. As such "[t]he oath offends due process." (344 U.S. at 191, 97 L.ed. at 222.) The decision thus is that before the individual's liberties may be abridged due process requires proof that he personally intends or engages in conduct to achieve the proscribed objectives, and that this proof can not be supplied by inference drawn only from his mere membership in an organization said to have those objectives. As the course of decision developed this principle was extended to membership in organizations found in quasi-judicial proceedings to have such objectives.

That development was reached in Aptheker v. Secretary of State, 378 U.S. 500, 12 L. ed.2d 992 (1964). There the Secretary of State had revoked passports of two admitted "top-ranking leaders" of the Communist Party (378 U.S. at 515, 12 L.ed.2d at 1002) under §6 of the Subversive Activities

Control Act (50 U.S.C. §785) solely on the ground of their membership in that organization. (378 U.S. at 504, 12 L.ed.2d at 996.) Relying specifically on the principle of Wieman v. Updegraf, supra, the Court struck down the Secretary's action as a denial of due process. It held that when the mere fact of an individual's membership in a group "has been made the sole criterion for limiting the individual's freedom" this constitutes "indiscriminate classification of innocent with knowing activity." (378 U.S. at 510, 12 L.ed.2d at 1000.) To make plain the significance of its holding the Court observed that by making mere membership the grounds for passport revocation the statute created "an irrebuttable presumption that individuals who are members of the specified organization will, if given passports, engage in activities inimical to the security of the United States." (378 U.S. at 511, 12 L.ed.2d at 1000.) This was held contrary to the teaching of Schneiderman v. United States, 320 U.S. 118, 136, 87 L.ed. 1796, 1808 (1942) and Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796 (1957) that even where the organization has improper objectives it can not

be "automatically inferred" that all members share them. Further in Aptheker, the Court held that to sustain the revocation proof was needed, related to the individual personally, concerning his specific intent and his purposes in traveling. (378 U.S. at 511, 12 L.ed.2d at 1000, 1001.)

The effect of the Petitioner's rule against communists as applied in this case is also similar to that involved in Elfbrandt v. Russell, supra; it imposes "a conclusive presumption that the member shares the unlawful aims of the organization." (384 U.S. at 17, 16 L.ed.2d at 325.) The establishment of such a presumption rests upon irrational inferences that contravene due process of law.

A state may make proof of one fact the basis for inference of the ultimate fact in issue only where there is a rational connection between what is proved and what is to be inferred. Where such rational connection is lacking the statute violates due process. Manley v. Georgia, 279 U.S. 1, 73 L.ed. 575 (1928). In that case a state statute provided that the fact of insolvency of a bank gave rise to the presumption of fraud on the

part of its officers. The rational connection was held lacking for obviously bank failures occur without fraud by management. In Western A & R Co. v. Henderson, 279 U.S. 639, 73 L.ed. 884 (1928), the fact of a grade crossing collision causing death was by statute made the basis for inferring negligence against the employees of the railroad. This interference was held to contravene normal experience because such collisions may well be caused by the negligence of the traveler on the highway or without the fault of anyone. Since the presumption was arbitrary it operated to deny fair opportunity to repel it; the statute violated the due process clause of the Fourteenth Amendment. (279 U.S. at 642, 73 L.ed. at 888.) See also Tot v. United States, 319 U.S. 463, 87 L.ed. 1519 (1942) (statutory presumption that the possession of a firearm or ammunition by a person who had been convicted of a crime of violence or was a fugitive from justice was presumptive evidence that he had shipped, transported or received the same in interstate commerce, held to be arbitrary and violative of due process); Bollenbach v. United States,

326 U.S. 607, 90 L.ed. 350 (1945) (statute created presumption that mere possession of private property that had been stolen in another state gave rise to the presumption that the possessor was involved in the interstate transportation thereof; held arbitrary and violative of due process.)

Where the presumption is made merely rebuttable but operates in areas protected by the First Amendment, such as membership and association, it is impermissible. For even so limited a presumption in these circumstances shifts to the member a burden too close to that of proving that his First Amendment exercise was in fact innocent and affords no basis of adverse inferences against him. So operative, the presumption violates due process and impedes First Amendment liberty. Speiser v. Randall, 357 U.S. 513, 529, 2 L.ed.2d 1460, 1475 (1958).

3. This Case is Not Governed by American Communications Association v. Douds, 339 U.S. 382, 94 L.ed. 925 (1950).

In Douds the requirement of §9(h) of the Labor Management Relations Act, 1947 (29 U.S.C.A. 159(h)) that union officers file non-Communist affidavits was upheld against attack based on the First Amendment and on the Bill of Attainder clause.[2/] The First Amendment aspects of that opinion have never been explicitly overruled. but surely the later course of decision has eviscerated that holding. The thesis that Congress could properly conclude that union officers who were members of the Communist Party are "likely" to use their positions to bring about political strikes for revolutionary objectives (339 U.S. at 390-391, 94 L.ed. at 939-940) will not stand against the rationale of Keyishian, Elfbrandt, Robel, and Wieman, supra, that organizational

2/ The statute was also held not to be void for vagueness in failing to give fair warning of the offense defined (339 U.S. at 412-413, 94 L.ed. at 951-952.) This point is not involved in the case at bar.

objectives can not be inferred against a member solely by virtue of his maked membership. Douds contradicts the Schneiderman rubric that membership may be innocent and the teaching of Wieman that to classify innocent with knowing activity is "arbitrary." Douds significantly makes no inference to Schneiderman and Wieman was decided after Douds -- as were the other cases cited just above.

Whatever the vitality of Douds, this Court has in United States v. Brown, 381 U.S. 437, 14 L.ed.2d 484 (1965) made it unequivocally plain that it will not permit the inference-from-mere-membership that Petitioner seeks to make here. The Brown reasoning is the more pertinent because it draws upon the very "'overbroadness' cases" (381 U.S. at 456, n. 31, 14 L.ed.2d 496, n. 31) utilized in the foregoing argument:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list

of undesirable characteristics. For, as the Court noted in Scheiderman v. United States, 320 U.S. 118, 136, 87 L.ed. 1796, 1808, 63 S.Ct. 1333, 'under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.' Just last Term, in Aptheker v. Secretary of State, 378 U.S. 500, 12 L.ed.2d 992, 84 S.Ct. 1659, we held §6 of the Subversive Activities Control Act to violate the Constitution because it 'too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that §6 inflicted its deprivation upon all members of Communist organizations without regard to whether there existed any demonstrable relationship between the charactertistics of the

person involved and the evil Congress sought to eliminate. Id., at 509-511, 12 L.ed.2d at 999, 1000. These cases are relevant to the question before us. Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, 'it cannot automatically be inferred that all members share[e] their evil purposes or participate[e] in their illegal conduct.' " (381 U.S. at 455-456, n. 31, 14 L.ed.2d 495-496.)

While Brown distinguished Douds (381 U.S. at 457-458, 14 L.ed.2d 496-497) it did so on the question of Bill of Attainder. But the reasoning just quoted, premised on the very concept of overbreadth urged here, of necessity applies far beyond the confines of Bill of Attainder. As we read the Court's reasoning in context the opinion says that because such overbreadth suffers from the constitutional and logical infirmities presented in the language quoted the term "members of the Communist Party" could not be read as "shorthand" compendium of

constitutionally proscribable characteristics. This conclusion, it seems plain, rests on the conclusion that it is a "fallacy" to assume that one member of an organization has the characteristics attributed to the organization. The characteristics of the individual are to be proven factually, not inferred from his membership. Brown, then, wrote law wholly inconsistent with the First Amendment sections of the Douds opinion. But that added nothing really new for the same had already been done by the cases cited in Points 1 and 2, ante.

In these lights the reservation in the Bryson v. United States, 396 U.S. 64, 24 L.ed.2d 264 (1969) opinion concerning the vitality, if any, of Douds (396 U.S. at 68, 24 L.ed.2d at 268) have no relevance here. For that statement was made with reference to Bill of Attainder, a point which the Court declined to decide and which is not presented here, and the case was decided on the wholly different and unrelated grounds that unconstitutionally will not be heard to excuse voluntary deceit. (Idem.)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent
ANGELA Y. DAVIS

ADDENDUM

As this brief was at the printer's, counsel learned of this Court's decision in Healy v. James, No. 71-452, dc. 6-26-72, 40 L.W. 4887. Involving the refusal of "official recognition" to a chapter of Students for a Democratic Society by a state college, the decision determines issues apposite to this case and re-enunciates the principles of First Amendment overbreadth invoked above. The Court specifically addressed itself (40 L.W. at 4892) to the question whether a local campus chapter of S.D.S. could be refused recognition because of its connection with national S.D.S. The latter organization

had been "found" by a Congressional Committee to have engaged in "violent and disruptive" activities and to have had affiliations with local campus chapters embracing recognition of the latter by the national organization and cooperation between the two. (48 L.W. at 4890.) There was no showing that the local chapter there involved was committed to implementation of unlawful aims attributed to the national organization. Upon such a record it was held that the principles of Robel, Keyishian and Elfbrandt apply so as to require proof of specific intent to effectuate such aims before First Amendment liberties may be abridged:

> "Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of

Regents, 385 U.S. 589, 605-610 (1967); Elfbrandt v.Russell, 384 U.S. 11 (1966); Scales v. United States, 367 U.S. 203 (1961). In these cases it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights. United States v. Robel, 389 U.S. at 265. The Government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."

The decision, we submit, controls here as do the authorities it cites. It again shows the inapplicability to this case of the Douds opinion. The rejection of guilt by association invoked here by Petitioner is surely by now firmly and irrevocably rejected.

The Court's further holding in Healy that the state college may not consistent with the First Amendment refuse "recognition" to an organization whose philosophy it dislikes or abhors, speaks to the implicit premise of Petitioner's position here. Petitioner may not deny employment to those whose views it rejects.

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a public corporation,

Petitioner,

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KENNETH L. KARST, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Three.

RESPONDENTS' (TAXPAYERS) BRIEF IN OPPOSITION.

Question Presented.

Whether a State University can, consistent with the First and Fourteenth Amendments to the United States Constitution as well as the California Constitution, establish and maintain a conclusive presumption that no member of the Communist Party is academically qualified to teach.

Statement of the Case.

The Statement of the Case contained in the Petition for a Writ of Certiorari accurately sets forth certain of the chronology of this litigation. That chronology is amplified in the Brief in Opposition filed by respondent

Angela Y. Davis. This Brief in Opposition is presented on behalf of Respondents Karst, Kaplan, Glasgow, Moore and Deutsch, the original plaintiffs below.

The decision of the California Court of Appeal (App. A of the Petition), consistent with the clear and unambiguous decisions of this Court and of the California Supreme Court, affirmed the trial court's decision which held that the denial of public employment on the sole criteria of membership in the Communist Party impermissibly and unnecessarily infringes upon an individual's right to freedom of association, a right which is solidly imbedded in the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 9 and 10 of the California Constitution.[1]

Reasons for Denying the Writ.

The Writ should be denied because there is no issue presented by this case which has not been fully resolved by applicable decisions of this Court; because the decision below is in complete accord with those decisions; and because the judgment rests alternatively on an independent state ground which is beyond the purview of this Court's jurisdiction.

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[1]A hearing was sought in and denied by the California Supreme Court. That fact implies that the California Supreme Court did not believe the decision below was at odds with applicable cases or that an important question was otherwise presented. Rule 29(a)(1) of the California Rules of Court specifies, as a ground for hearing in the Supreme Court, a necessity "to secure uniformity of decision or the settlement of important questions of law". A denial of a hearing by that Court, unlike a denial of certiorari by this Court, has been said by the California Supreme Court to be not "without significance as to [its] views . . . ." *Di Genova v. Board of Education*, 57 Cal.2d 167, 178, 367 P.2d 865, 871 (1962). The weight to be accorded a denial of hearing by the California Supreme Court has, how-

ARGUMENT.

1. The Federal Question Decided by the California Court of Appeal Has Been Previously Determined Many Times by This Court; and the Opinion of the Court of Appeal Is Fully in Accord With This Court's Prior Applicable Decisions.

As reflected in the Petition itself, the Regents of the University of California (hereinafter "Petitioner") has a long established written policy of excluding from the faculty of the University of California all members of the Communist Party. Petitioner seeks to have this Court uphold that policy on the basis of a conclusive presumption, arising solely from the fact of such membership, that all members of the Party "are disqualified from serving on its faculty by *reason of lack of academic integrity or want of professional ethics.*" (Pet., pp. 6-7; italics in the original.)

In a long series of cases, this Court has decided that membership alone, in the Communist Party or any other lawful organization, can never serve as the basis for governmental imposition of disabilities or liabilities directly[2] upon an individual. *Wieman v. Updegraff*, 344 U.S. 183 (1952) [University faculty position];

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ever, been the subject of substantial argument. Kanner, *It's a Busy Court: The Effect of Denial of Hearing by the Supreme Court on Court of Appeal Decisions*, 47 CALIF. STATE BAR J. 188-193 (May-June 1972).

[2]*American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950), which is virtually the sole authority relied on by Petitioner, has been distinguished on the ground, among others, that the policy basis for the statute in that case, while discouraging "unions from choosing officers with Communist affiliations . . . did not affect basic individual rights to work . . . ." *Aptheker v. Secretary of State*, 378 U.S. 500, 512 (n. 11) (1964), where the Court held that denial of a passport was a "more 'drastic'" "abridgment of liberty" than the statute in *Douds*, because the disability applied directly to the individual. *Id.* See also Note 7, *infra*, for a further discussion of *Douds*.

Aptheker v. Secretary of State, 378 U.S. 500 (1964) [revocation of passport]; *Elfbrandt v. Russell*, 384 U.S. 11 (1966) [teaching position]; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) [University faculty position]; *United States v. Robel*, 389 U.S. 258 (1967) [employment in designated "defense facilities"]; *Baird v. State Bar*, 401 U.S. 1 (1971) [admission to practice law]. See also *United States v. Brown*, 381 U.S. 437 (1965).

The concept firmly established by these and other cases is that no governmental objective, however laudatory, can constitutionally be advanced by laws or regulations based solely upon inferences to be drawn from an individual's political beliefs, convictions or affiliations. Where such basic First Amendment freedoms are involved, laws must be drawn with that degree of precision necessary to assure that the disability or liability is based upon characteristics or conduct of the individual himself. Government is simply not permitted the shortcut of presuming that every individual in a group necessarily shares what may be deemed to be the evils of the group itself—even where that group is the Communist Party.[3]

Laws which are so broad as to violate this principle have been uniformly struck down not only because of the basic unfairness to the given individual, but also

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[3]"In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. For, as the Court noted in *Schneiderman v. United States*, 320 U.S. 118, 136, 'under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.' " *United States v. Brown*, 381 U.S. 437, 455-456 (1965).

because of the "chilling effect" that such laws would have on all who otherwise seek to exercise their fundamental right to form or join the political association of their choice.

So it is with Petitioner's Policy. The constitutional defect in that Policy is its blanket disqualification of all members of the Communist Party. "[M]ere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities . . . ." *Baird v. State Bar,* 401 U.S. 1, 9 (1971) (Stewart, J. concurring). The imposition of disabilities because of membership alone, without any added showing, is tantamount to establishing "guilt by association alone", *United States v. Robel,* 389 U.S. 258, 265 (1967); "has the potential of curtailing free expression by inhibiting persons from establishing or retaining such associations", *id.* at 270 (Brennan, J. concurring); and is "an assertion of arbitrary power", *Wieman v. Updegraff,* 344 U.S. 183, 191 (1953). Petitioner's Policy applies uniformly to all members, without further distinction of any kind. On that ground alone, the decisions of this Court compelled a declaration of its constitutional invalidity. *See also Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *Vogel v. County of Los Angeles,* 68 Cal.2d 18, 434 P.2d 961 (1967).

Significantly, Petitioner does not question the viability of these cases, nor does it seek to have this Court reexamine the premises underlying the "overbreadth" doctrine. Rather, Petitioner attempts to distinguish the controlling cases on the purported ground that each dealt with a presumption of "disloyalty or subversive activities", whereas Petitioner's conclusive presumption is that "members of the Communist Party are disquali-

fied from service on its faculty *by reason of lack of academic integrity or want of professional ethics.*" (Pet., pp. 6-7, italics in original.)

The distinction is unsound, as it misses the whole point of the overbreadth doctrine. Under that doctrine, it is the drawing of an adverse inference from the fact of association, rather than the specifics of the inference drawn, which constitutes the evil to be avoided.

Furthermore, the premise of the purported distinction is inaccurate. There is nothing to distinguish Petitioner's Policy from the nearly identical policy of New York's Feinberg Law, struck down by this Court in *Keyishian, supra.* There, membership in the Communist Party constituted *prima facie* evidence that an individual was unfit to teach in the State's public schools or public university system. After a general description of overbreadth principles, the *Keyishian* Court stated:

> But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these [overbreadth] limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies. *Elfbrandt* [*Elfbrandt v. Russell,* 384 U.S. 11 (1966)] and *Aptheker* [*Aptheker v. Secretary of State,* 378 U.S. 500 (1964)] state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization *or which is not active membership* violates constitutional limitations. 385 U.S. at 607-08. (Emphasis added.)[4]

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[4]In the term which just concluded, this Court expressly reaffirmed *Keyishian* in *Perry v. Sinderman,* 40 L.W. 5087, 5089

Petitioner's Policy falls squarely within the fact situation and governing standard of *Keyishian*. It applies, as did the Feinberg Law in *Keyishian*, to teachers at a public university. It, like the Feinberg Law, sanctions membership alone without any requirement of establishing an individual's active membership or his specific intent to further the unlawful goals of the Communist Party.

Indeed, if anything, the *conclusive* presumption of the Regents' Policy is even more constitutionally defective than the Feinberg Law provision invalidated in *Keyishian*. The Feinberg Law, as interpreted by the New York courts, created only a *prima facie* presumption that a Party member was unfit to teach. 385 U.S. at 608. This *prima facie* presumption could be rebutted by certain showings of fact, which the *Keyishian* Court held to be too limited to satisfy constitutional requirements. *Id.* The Regents' Policy embodies a *conclusive* presumption from membership alone, which cannot be rebutted by any type of showing.

Not only is Petitioner's distinction of the overbreadth cases unsound, it carries if anything a greater chilling effect than the cases it seeks to distinguish. As so aptly put by the trial judge below, "this is the most terrifying proposition that has ever been argued before this court . . . ." [R.T. 43-44.] What Petitioner in effect says, in the guise of preserving freedom of inquiry, is that students must be protected from teachers whose inquiry has led them in the "wrong" direction. Given the solicitude that this Court has shown for the preservation of First Amendment freedoms in the academic

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(6-29-72), and cited it with approval in *Healy v. James*, 40 L.W. 4887, 4892 (6-26-72), and *Cole v. Richardson*, 40 L.W. 4381, 4383 (4-18-72).

community,[5] the very nature of Petitioner's purported distinction adds to the "terrifying" nature of its position.

This Court reached the result it did in *Wieman, Keyishian* and *Elfbrandt* specifically because the oaths there in question were broad enough to *include* "mere" membership in the Communist Party, the evil of which was said to be "the stifling effect on the academic mind". *Keyishian v. Board of Regents, supra,* 385 U.S. at 607. Yet it is in the name of "academic freedom" that Petitioner seeks to validate its Policy. (Pet., p. 13, *et seq.*) This brand of double-think is perhaps most clearly illustrated by the following choices of quotations cited by Petitioner in *support* of its position (Pet., pp. 13-14, 17-18):

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyishian v. Board of Regents,* 385 U.S. 589, 603, quoted at Pet., p. 13.
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> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957), quoted at Pet., pp. 13-14.
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> "The process of education has naturally enough been the basis of hope for the perdurance of our

[5]The most recent example being *Healy v. James,* 40 L.W. 4887 (6-26-72), quoted at length in Respondent Davis' Brief in Opposition, pp. 21-24.

democracy on the part of all our great leaders, from Thomas Jefferson onwards.

"To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. *They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.* They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma." *Wieman v. Updegraff*, 344 U.S. 183, 196 (concurring opinion of Frankfurter, J., quoted at Pet., pp. 17-18).[6]

In each of the cited opinions, the author was making the point that pursuit of truth is meaningless if the teacher is foreclosed from following that pursuit wherever it leads, even where it leads to membership in the Communist Party. Petitioner's selection of such passages to support its need for "maintaining conditions promoting academic freedom" (Pet., p. 13), by then excluding all teachers whose pursuit has gone in a given direction, is the most eloquent indictment of its position which could be developed.[7]

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[6]Italics not in the original, but added in the Petition.

[7]The Regents' reliance on *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950), does not strengthen their discredited argument. *Douds* was decided before the development

2. Alternative Methods Already Exist Which Further the Goals of Petitioner's Policy Without Infringing on Constitutional Rights.

Neither Respondents nor any of the courts below have taken issue with Petitioner's assertion that faculty fitness is a legitimate and substantial state interest. It is the method by which Petitioner has chosen to promote that interest that is at issue. As Petitioner recognizes in its Petition, p. 11, restrictions on First Amendment freedoms must be "no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367 (1968). The University already has in operation extensive mechanisms which advance the same interests which it seeks to promote through its Policy, but which do not infringe unnecessarily on constitutionally protected rights.

Both appointments to the faculty of the University and advancement to higher faculty positions are governed by officially adopted criteria, which are included herein in the Appendix. The criteria for faculty appointment and advancement, and the application procedures, protect all the interests—academic integrity, commitment to academic freedom, objective pursuit of truth in research, objectivity in teaching and compliance with professional ethics—which Petitioner seeks to insure by its policy of terminating faculty appoint-

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of the cases leading to *Keyishian.* The statute with which *Douds* was concerned (Section 9(h) of the Labor Management Relations Act of 1947) has since been repealed and its successor statute ruled unconstitutional. *United States v. Brown,* 381 U.S. 437 (1965). Mr. Justice White, dissenting in *Brown,* concluded that *Douds* "is obviously overruled", 381 U.S. at 464-65. Justices Douglas and Black subsequently agreed that *Douds* "obviously belongs to a discredited regime, though . . . it has never been officially overruled". *Bryson v. United States,* 396 U.S. 64, 76 (1969) (dissenting opinion).

ments solely on the basis of political affiliation. Yet they do not infringe unnecessarily on constitutionally protected rights.

In short, the interests Petitioner seeks to protect are already protected by constitutional means. Those interests are not doomed to extinction by a declaration that its conclusive presumption of academic unfitness from Communist Party membership alone is unconstitutional.

3. This Court Should Not Take Jurisdiction of This Case Because the Judgment Below Is Supported by an Adequate and Independent State Ground.

As a matter of state law, "all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate" must comply with the California Constitution in order to be valid. California Constitution, Article XXII, §1. See *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972), *cert. denied*, May 30, 1972. Article I, Section 9 of the California Constitution states in part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Article I, Section 10 of the California Constitution provides: "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

The trial court in the instant case expressly held that Petitioner's Policy is

> *in violation of Article I, Sections 9 and 10, of the California Constitution*, and of the First and Fourteenth Amendments of the Constitution of the

> United States of America, because [it] automatically exclude[s] from faculty employment by the University of California, solely by virtue of such membership, any person who is a member of the Communist Party. (Pet., App. B, at xii.) (Emphasis added.)

The California Court of Appeal, in affirming the trial court judgment in its entirety, specifically quoted the above portion of the trial court order (Pet., App. A, at vi). Thus the invalidity under the California Constitution of the policy in question has been established and preserved at each level in the proceedings below.

In this case, where the state court relied upon both the California and United States Constitutions to invalidate the University's policy, it would be inappropriate for this Court to accept jurisdiction. *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487 (1965); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934).

Conclusion.

There are no novel or unsettled questions of law in the instant action. *Keyishian, Elfbrandt,* and other decisions of this Court, together with the California Constitution, clearly dictated the lower court's conclusion that Petitioner's Policy of automatic exclusion of Communist Party members from its faculty cannot stand.

Respondents agree with the "great principle" cited by Petitioner (Pet., p. 17) and expounded by Mr. Justice Frankfurter, concurring in *Wieman v. Updegraff,* 344 U.S. 183, 196. Unlike Petitioner, Respondents agree also with the conclusion that Mr. Justice Frankfurter was advocating in *Wieman,* the conclusion that state-imposed disabilities should not be permitted merely

upon the affiliation of an individual with a particular organization:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. 344 U.S. at 195.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

University of California, Administrative Manual, Chap. 2, § 50-1.

INSTRUCTIONS TO APPOINTMENT AND PROMOTION COMMITTEES

A. *Purpose and Responsibility of the Review Committees*

The quality of the faculty of the University of California is maintained primarily through objective and thorough appraisal, by competent faculty members, of each candidate for appointment or promotion. Responsibility for this appraisal falls largely upon the review committees nominated by the Committee on Budget and Interdepartmental Relations and appointed by the Chancellor or his designated representative. It is the duty of these committees to ascertain the present fitness of each candidate and the likelihood of his pursuing a productive career. In judging the fitness of the candidate it is appropriate to consider his professional integrity as evidenced by his performance of his duties. (A useful guide for such consideration is furnished by the Statement on Professional Ethics issued by the American Association of University Professors. A copy of this Statement is appended to these instructions for purposes of reference.) Implied in the committee's responsibility for building and maintaining a faculty of the highest excellence is also a responsibility to the candidate for just recognition and encouragement of achievement.

B. *Maintenance of the Committee's Effectiveness*

(1) THE MEMBERSHIP, DELIBERATIONS, AND RECOMMENDATIONS OF THE REVIEW COMMITTEE ARE STRICTLY CONFIDENTIAL. The chairman of an appointment or promotion committee should remind members of the committee, and others whom it is essential for the committee to consult, of the confidential nature of the assignment. This should be kept in mind for arranging for all written or oral communications; and when recommendations with supporting documents have been forwarded, all copies or preliminary drafts should be destroyed.

(2) The whole system of review by appointment and promotion committees depends for its effectiveness upon each committee's prompt attention to its assignment and its conduct of the review with all possible dispatch, consistent with judicious and thorough consideration of the case.

(3) The Chairman of the review committee has the responsibility of making sure that each member of the committee has read and understands these instructions.

C. *Procedure*

(1) *General*—Recommendations for appointments and promotions normally originate with the Department Chairman. His letter of recommendation should provide a comprehensive assessment of the candidate's qualifications together with detailed evidence to support this evalua-

tion. The letter should also present a report of the Department Chairman's consultation with the members of his Department, including any dissenting opinions. In addition to his letter of recommendation, the Department Chairman is expected to assemble and submit to the Chancellor an up-to-date biography and bibliography, together with copies of research publications or other scholarly or creative work.

(2) *Appointments*—The Department Chairman should include in his documentation opinions from colleagues in other institutions where the nominee has served and from other qualified persons having firsthand knowledge of the nominee's attainments. Extramural opinions are imperative in the case of proposed appointments to tenure status of persons from outside the University.

(3) *Promotions*—Promotions are based on merit; they are not automatic. Achievement, as it is demonstrated, should be rewarded by promotion. Promotions to tenure positions should be based on consideration of comparable work in a man's own field or in closely related fields. The Department and the review committee should consider how the candidate stands in relation to other people in his field outside the University who might be considered alternative candidates for the position. It is also recommended that the Department Chairman supplement the opinions of his colleagues within the Department by letters from distinguished extramural informants.

(4) *Assessment of Evidence*—The review committee shall assess the adequacy of the evidence submitted. If in the committee's judgment the evidence is insufficient to reach a clear recommendation, the committee chairman, through the Chancellor, shall request amplification. In every case all obtainable evidence shall be carefully considered.

If, according to all obtainable evidence, the candidate fails to meet the criteria set forth in Section d. below, the committee should recommend against appointment or promotion. If, on the other hand, there is evidence of unusual achievement, and exceptional promise of continued growth the committee should not hesitate to endorse a recommendation for accelerated advancement.

D. *Criteria for Appointment and Promotion*

The review committee shall judge the candidate with respect to the proposed rank and duties, considering the record of his performance in (a) teaching, (b) research or other creative work, (c) professional activity, and (d) university and public service. In evaluating the candidate's qualifications within these areas, the review committee shall exercise reasonable flexibility, balancing, where the case requires, heavier commitments and responsibilities in one area against lighter commitments and responsibilities in another. The review committee must judge whether the candidate is engaging in a program of work that is both sound and productive. As the University enters new fields of endeavor and refocuses its ongoing activities, cases will arise in which the proper work of faculty members departs markedly from established academic patterns. In

such cases the review committees must take exceptional care to apply the criteria with sufficient flexibility. However, flexibility does not entail a relaxation of high standards. Superior intellectual attainment, as evidenced both in teaching and in research or other creative achievement, is an indispensable qualification for appointment or promotion to tenure positions. Insistence upon this standard for holders of the professorship is necessary for maintenance of the quality of the University as an institution dedicated to the discovery and transmission of knowledge.

The criteria set forth below are intended to serve as a guide in judging the candidate, not to set boundaries to the elements of performance that may be considered.

(1) *Teaching*—Effective teaching is an essential criterion to appointment or advancement. Under no circumstances will a tenure commitment be made unless there is clear documentation of ability and diligence in the teaching role. In judging the effectiveness of a candidate's teaching, the committee should consider such points as the following: the candidate's command of his subject; his continuous growth in his field; his ability to organize his material and to present it with force and logic; his capacity to awaken in students an awareness of the relationship of his subject to other fields of knowledge; his grasp of general objectives; the spirit and enthusiasm which vitalize his learning and teaching; his ability to arouse curiosity in beginning students and to stimulate advanced students to creative work; his personal attributes as

they affect his teaching and his students; the extent and skill of his participation in the general guidance and advising of students. The committee should pay due attention to the variety of demands placed on instructors by the types of teaching called for in various disciplines and at various levels, and should judge the total performance of the candidate with proper reference to his assigned teaching responsibilities. The committee should clearly indicate the sources of evidence on which its appraisal of teaching competence has been based. In those exceptional cases where no such evidence is available, the candidate's potentialities as a teacher may be indicated in closely analogous activities.

It is the responsibility of the Department Chairman to submit meaningful statements, accompanied by evidence, including evaluations of the candidate solicited from students, concerning the candidate's teaching effectiveness at lower-division, upper-division, and graduate levels of instruction. If such information is not included in the letter of recommendation, it is the review committee chairman's responsibility to request it, through the Chancellor.

No single set of satisfactory criteria can be prescribed; however, among significant types of evidence of teaching effectiveness are the following: (1) Opinions of other members of the candidate's Department, particularly if based on class visitations, on attendance at public lectures or lectures before professional societies given by the candidate, or on the candidate's results in courses prerequisite to those of the in-

formant. (2) Opinions of students. (3) Opinions of graduates who have achieved notable professional success since leaving the University. (4) Number and caliber of students guided in research by the candidate and of those attracted to the campus by his repute as a leader. (5) Development of new and effective techniques of instruction.

(2) *Research and Creative Work*—Evidence of a productive and creative mind should be sought in the candidates published research or recognized artistic production in original architectural or engineering designs, or the like.

Publications in research and other creative accomplishment should be evaluated, not merely enumerated. There should be evidence that the candidate is continuously and effectively engaged in creative activity of high quality and significance. Work in progress should be assessed whenever possible. When published work in joint authorship (or other product of joint effort) is presented as evidence it is the responsibility of the Department Chairman to establish as clearly as possible the role of the candidate in the joint effort. It should be recognized that special cases of collaboration occur in the performing arts and that the contribution of a particular collaborator may not be readily discernible as his by those viewing the finished work. When the candidate is such a collaborator it is the responsibility of the Department Chairman to make a separate evaluation of the candidate's contribution and to provide outside opinions based on observation of the work while in prog-

ress. Account should be taken of the type and quality of creative activity normally expected in the candidate's field. Appraisals of publications or other works in the scholarly and critical literature provide important testimony. Textbooks, reports, circulars, and similar publications normally considered evidence of teaching ability or public service, or contributions by candidates in the professional school faculties to the professional literature, the advancement of professional practice or of professional education, should be judged creative work when they present new ideas or incorporate scholarly research.

In certain fields such as art, architecture, dance, music, literature, and drama, distinguished creation should receive consideration equivalent to that accorded to distinction attained in research. In evaluating artistic creativity, an attempt should be made to define the candidate's merit in the light of such criteria as originality, scope, richness, and depth of creative expression. It should be recognized that in music, drama, and dance, distinguished performance, including conducting and directing, is evidence of a candidate's creativity.

(3) *Professional Competence and Activity*—In certain positions in the professional schools and colleges, such as architecture, business administration, dentistry, engineering, law, medicine, etc., a demonstrated distinction in the special competences appropriate to the field and its characteristic activities should be recognized as a criterion for appointment or promotion. The

candidate's professional activities should be scrutinized for evidence of achievement and leadership in the field and of demonstrated progressiveness in the development or utilization of new approaches and techniques for the solution of professional problems. It is the responsibility of the Department Chairman to provide evidence that the position in question is of the type described above and that the candidate is qualified to fill it.

(4) *University and Public Service*—The faculty plays an important role in the administration of the University and in the formulation of its policies. Recognition should therefore be given to scholars who prove themselves to be able administrators and who participate effectively and imaginatively in faculty government and the formulation of departmental, college, and University policies. Services by members of the faculty to the community, state, and nation, both in their special capacities as scholars and in areas beyond those special capacities when the work done is at a sufficiently high level and of sufficiently high quality, should likewise be recognized as evidence for promotion. Similarly, contributions to student welfare through service on student-faculty committees and as adviser to student organizations should be recognized as evidence.

E. *The Report*

(1) The report of the review committee forms the basis for further review by the Budget Committee and for action by the Chancellor and by the President. Consequently, it should include

an appraisal of all significant evidence favorable and unfavorable. It should be specific and analytical and should include the review committee's evaluation of the candidate with respect to each of the qualifications specified above. It should be adequately documented by reference to the supporting material.

(2) The review committee has the responsibility of making an unequivocal recommendation. No member should subscribe to the report if it does not represent his judgment. If the committee cannot come to a unanimous decision, the division of the committee and the reason therefor should be communicated either in the body of the report or in separate concurring or dissenting statements by individual members, submitted with the main report and with the cognizance of the other committee members.

Appended for reference on the following pages is the AAUP Statement on Professional Ethics referred to in the first section of these instructions.

American Association of
University Professors Bulletin
Vol. 52, p. 290-291, 1966
(Reprinted) Vol. 55, p. 86-87, 1969
Statement on Professional Ethics
(Endorsed by the
Fifty-Second Annual Meeting)

The Statement

I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek

and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.

II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic

freedom, he maintains his right to criticize and seek revision. He determines the amount and character of the work he does outside his institution with the due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.

V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.